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JUN 19 2002

June 19, 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

William F. Caton
Acting Secretary
Federal Communications Commission
445 12th St., S.W. - TW-A325
Washington, D.C., 20554

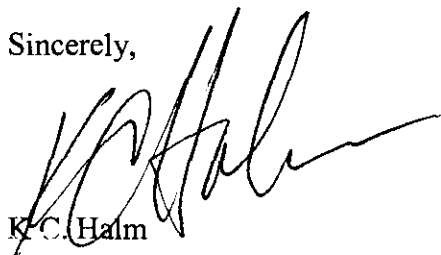
**Re: Petition of Global NAPs South, Inc. for Preemption of the Jurisdiction of
the Virginia State Corporation Commission Regarding Interconnection
Disputes With Verizon-Virginia, Inc., et al. Docket No. 02-180**

Dear Secretary Caton:

Enclosed please find an original and four (4) copies of the Petition for Preemption of Global NAPs South, Inc. for filing in the above referenced case.

Please date-stamp as received the enclosed "Stamp & Return" copy, and return in the enclosed envelope provided for your convenience. Please call me with any questions regarding this filing.

Sincerely,



K.C. Halm

cc: Attached Service List
William Rooney
James Scheltema

ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED

JUN 19 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Petition of Global NAPs South, Inc.)
Pursuant to Section 252(e)(5) of the)
Communications Act for Expedited)
Preemption of the Jurisdiction of the)
Virginia State Corporation Commission)
Regarding Interconnection Disputes)
with Verizon -Virginia, Inc.)

WC Docket No. 02-180

**PETITION FOR PREEMPTION
OF GLOBAL NAPs SOUTH, INC.**

Global NAPs South, Inc. ("Global NAPs South"), by its attorneys, and pursuant to § 252(e)(5) of the Communications Act, as amended (the "Act"),¹ and section 51.803 of the Federal Communications Commission's (the "FCC" or "Commission") rules,² respectfully requests that the FCC preempt the Virginia State Corporation Commission ("Virginia Commission") and arbitrate an interconnection agreement between Global NAPs South and Verizon-Virginia, Inc. ("Verizon"). This petition arises from the Virginia Commission's Preliminary Order³ and refusal to act on Global NAPs South's requests for arbitration of the interconnection agreement with Verizon pursuant to § 252(b) of the Act. In light of the Virginia Commission's refusal to act, Global NAPs

¹ 47 U.S.C. § 252(e)(5).

² 47 C.F.R. § 51.803.

³ *In Re: Petition of Global NAPs South, Inc. for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with*

South requests that the Commission assume jurisdiction over and arbitrate Global NAPs South's interconnection agreements with Bell Atlantic.⁴

I. Background

Following lengthy negotiations between Global NAPs and Verizon (including but not limited to those concerning interconnection arrangements in Virginia), Global NAPs South filed its arbitration petition (the "Arbitration Petition") with the Virginia Commission on January 3, 2002. On February 20, 2002, the Virginia Commission issued a Preliminary Order on Global NAPs South's Arbitration Petition, expressly refusing to arbitrate pursuant to the Act but offering to proceed with arbitration under state law.⁵ Specifically, the Virginia Commission stated that:

Until the issue of Eleventh Amendment immunity from federal appeal under the Act is resolved by the Courts of the United States, we will not act solely under the Act's federally conveyed authority in matters that might arguably implicate a waiver of the Commonwealth's immunity, including the arbitration of rates, terms and conditions of interconnection agreements between local exchange carriers.⁶

Verizon Virginia, Inc., VA SCC, Case No. PUC020001 ((Feb. 20, 2002) ("*Preliminary Order*").

⁴ Bell Atlantic and GTE are now operating as "Verizon".

⁵ *Preliminary Order* at 3, citing *Order of Dismissal of the Application of AT&T Communications of Virginia, Inc., et al. For Arbitration with Verizon Virginia*, Case No. PUC000282 (Dec. 20, 2000).

⁶ Virginia Order at 1-2.

The Virginia Commission has thus refused to arbitrate using the federally mandated framework. Global NAPs South has filed this Petition because it is unwilling to forego the rights granted by the Act.

II. The Virginia Commission has Failed to Act.

The Commission's authority to assert jurisdiction under section 252(e)(5) of the Act is premised on a finding that a state commission has "failed to act" in "any proceeding or other matter under [§ 252]." The Virginia Commission has unequivocally refused to arbitrate a revised agreement between Global NAPs South and Verizon in accordance with the mandates set forth in §§ 251 and 252 of the Act. The Virginia State Corporation Commission's refusal to arbitrate an agreement under § 252 constitutes a failure to act within the meaning of § 252(e)(5).

Rather than conduct arbitration in accordance with the mandates of the Act, the Virginia Commission has allowed the parties to elect to proceed with arbitration under state law.⁷ It is important to note that, when resolving open issues and imposing conditions upon the parties during arbitration under § 252, a state commission must ensure that its resolution and conditions satisfy the requirements of § 251.⁸ Thus, by law, an arbitrated agreement may only be approved pursuant to § 252, if the resulting interconnection agreement satisfies the criteria set forth in § 251. The Virginia Commission's decision to arbitrate pursuant to the criteria used under state as opposed to federal law runs afoul of this requirement. In effect, the Virginia Commission could

⁷ The Virginia Commission informed the parties that they may proceed with arbitration before the FCC or "may pursue resolution of unresolved issues pursuant to [state law]." Virginia Order at 3.

ignore federally mandated rules interpreting and/or implementing the Act. In doing so, the Virginia Commission would arbitrate an agreement that necessarily violates the Act's requirements and would have to be rejected under § 252(e)(2).⁹ Moreover, Global NAPs South might be foreclosed from asserting its appeal rights under the Act if it voluntarily waives those rights.

III. The FCC Should Preempt the Virginia Commission.

Because of the Virginia Commission's outright refusal to proceed with arbitration under federal law, grant of this Petition would be consistent with the requirements of §§ 251 and 252(e)(5) and the Commission's decisions in *Starpower*¹⁰, *Cox*¹¹, *AT&T*¹² and *WorldCom*.¹³

⁸ 47 U.S.C. § 251(c)(1).

⁹ 47 U.S.C. § 252(e)(2) states: "The State commission may only reject... (B) [a]n agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the [FCC]. . ."

¹⁰ *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, FCC 00-216 (rel. June 14, 2000).

¹¹ *Cox Virginia Telecom, Inc., Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-126, DA 00-2118 (rel. Sept. 18, 2000).

¹² *In the Matter of the Petition of AT&T Communications of Virginia, Inc. Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc.*, CC Docket No. 00-251.

¹³ *In the Matter of the Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc.*, CC Docket No. 00-218.

The Act is clear. Section 252(e)(5) requires the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which the state commission “fails to act to carry out its responsibility” under § 252. Specifically, § 252(e)(5) provides that:

If a State commission fails to act to carry out its responsibility under this section *in any proceeding or other matter under this section*, then the Commission shall issue an order preempting the State commission’s jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State Commission.¹⁴

Indeed, the Commission has expressly acknowledged its authority to preempt a state’s jurisdiction in these instances.¹⁵

The language of § 252(e)(6) of the Act further supports grant of this Petition. There, Congress unequivocally stated that “[i]n a case where a State fails to act as described in [section 252(e)(5)], the proceeding by the Commission under such paragraph and any judicial review of the Commission’s actions shall be *the exclusive remedies* for a State commission’s failure to act.”¹⁶ Congress thus directed the Commission to serve as

¹⁴ 47 U.S.C. § 252(e)(5) (emphasis added).

¹⁵ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, 11628, ¶ 1285 (1996) (subsequent history omitted) (“*Local Competition Order*”). Furthermore, in the context of other preemption petitions, the Commission has also acknowledged its authority to enforce an agreement where the state commission fails to act. In *Starpower*, the Commission found that the Virginia Commission failed to act when it declined to interpret and enforce the interconnection agreement before it. As a result, the Commission assumed jurisdiction over enforcement of the agreement. *Starpower*, ¶ 7. The Commission took similar action in *Cox*. *Cox* at ¶ 4.

¹⁶ 47 U.S.C. § 252(e)(6) (emphasis added).

an alternative forum for mediation, arbitration and enforcement proceedings where a state fails to carry out its responsibilities under § 252 of the Act.

IV. The Commission's Section 252 Arbitration Process Should be Similar to the Generic Process Used by State Commissions.

Global NAPs South urges that upon preemption of the Virginia Commission's jurisdiction, the Commission should immediately begin arbitration of the interconnection agreement. It should employ the process used by many states.

A. General Format

Global NAPs South proposes that the Commission's arbitration process allow for pre-filed testimony, live cross-examination through either formal or informal hearings and briefing. Further, an arbitrator should consider evidence including, but not limited to, pre-filed testimony and exhibits introduced at the hearings on the disputed issues.

The Commission's rules mandate "final offer" arbitration.¹⁷ In accordance with these rules, each party would propose a final offer, which must: (1) meet the requirements of § 251, including the Commission's implementing rules; (2) establish rates for interconnection, services, or network elements according to § 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.¹⁸ The arbitrator may adopt one party's final offer in its entirety, or on an issue-by-issue basis. If the arbitrator believes the parties' final offers do not comply with the above

¹⁷ *Id.*

¹⁸ *Id.*, ¶ 1292.

requirements, the arbitrator has the discretion to adopt a result not submitted by any party or to allow the parties to submit new final offers.¹⁹

As part of this final offer arbitration process, the arbitrator should be directed to require, where possible, the parties to include specific contract language along with their unresolved issues so that the arbitrator can choose contract language as part of the arbitration decision. Global NAPs South's experience gained through nationwide state arbitration proceedings has shown that along with resolving issues in dispute, it is vital that the arbitrator also choose appropriate contract language for inclusion in a final interconnection agreement. The arbitrator should be urged to direct, wherever possible, the inclusion of specific contract language (proposed by one of the parties or developed by the arbitrator) that carries out and conforms to the arbitrator's decision.

Once the arbitrator has issued a decision, the parties should have an opportunity to file exceptions to that arbitrator's decision. After the parties file exceptions, the Commission (or the Commissioners) would have time to consider and then issue a final arbitration decision in accordance with § 252(b)(4)(c). It should then order the parties to file a conforming agreement by a date-certain. Upon issuance of the Commission's arbitration decision resolving all outstanding issues, the parties should be given time to conform the agreement to that decision. The completed agreement should be filed with the Commission for approval. Once the agreement is approved, the Commission should require that an information copy be filed with the Virginia Commission pursuant in accordance with § 252(h).

¹⁹ *Id.*

B. Time Frames

Global NAPs South acknowledges the Commission's determination not to be bound by the nine-month statutory deadline for completion of arbitration under section 252(b)(4)(C).²⁰ However, the Commission's rationale was based, in part, on the notion it might not receive a section 252(e)(5) petition for preemption until the nine-month statutory deadline was already passed. That is not the case here. The Virginia Commission did not wait until the nine-month deadline to fail to carry out its responsibilities under the Act. Instead, it released its decision well before that time. Upon receipt of the Virginia Commission's *Preliminary Order*, Global NAPs South has immediately sought preemption of the State's jurisdiction by the Commission in accordance with § 252(e)(5). Global NAPs South urges the Commission to step immediately and directly into the Virginia Commission's shoes with respect to both the duties and the time allotted for arbitration of these agreements under the Act.

Global NAPs South urges the Commission to proceed with arbitration as though the day it issues its preemption decision constitutes the 160th day of the state arbitration process (*i.e.*, the day Global NAPs South filed its Arbitration Petition with the State). The Commission should make every effort then to complete the arbitration process within the nine-month window established by the Act, or approximately 110 calendar days from its preemption decision.²¹ In other words, the Commission's timeframe for concluding

²⁰ *Local Competition Order*, ¶ 1291.

²¹ Within such time, the arbitrator must have issued a decision, exceptions must have been filed and the Commission must have considered and accepted or rejected the arbitrator's decisions on the unresolved issues and any exceptions thereto. All that will remain after the 110th day would be for the parties to conform the agreement to the Commission's

the arbitration portion of the case will closely approximate the timeframes imposed by the Act on the state commissions. Such a result would be fair because it would ensure that the case will not be subject to undue delay. In order to achieve this goal, upon preemption, the parties should nominate and the Commission should appoint the arbitrator so that the parties can immediately begin arbitration.

Once the Commission has rendered its decision (in writing), the parties should be given 30 days to conform the agreement to the decision of the Commission. In order to resolve disputes that may arise, the arbitrator should be retained to assist with disputes during this period.²² After this 30-day period, the parties would submit the agreement to the Commission for approval in accordance with § 252(d)(4) of the Act.²³

C. The Arbitrator

Global NAPs South suggests that arbitration of § 252 interconnection agreements should be conducted by a panel composed of one representative from each of three Commission offices: Common Carrier Bureau (“CCB”), Office of Engineering and Technology (“OET”), and Office of Plans and Policy (“OPP”) staff. Staff from these offices have day-to-day expertise in federal telecommunications law and understand both

arbitration decision and submit the agreement for approval by the Commission pursuant to § 252(e).

²² An arbitrator’s assistance is helpful in developing conforming language and a specific time for submission of the conformed agreement for vote. Without the assistance of an arbitrator, the process for finalizing an interconnection agreement can be easily and indefinitely delayed by the incumbent.

²³ The Commission has determined that the statutory deadline for arbitration applies only to the conclusion of an arbitration and not to the subsequent Commission approval of a resulting interconnection agreement. Because the Commission will have the opportunity to consider and decide all outstanding issues in arbitration, it is reasonable to assume that it will not need more than 30 days to render its approval of the ensuing agreement.

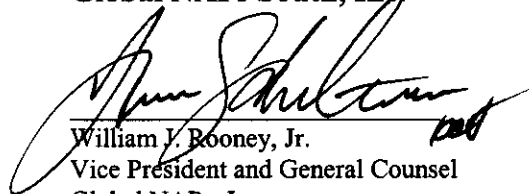
the full range of arbitration issues and the operations of local exchange carriers. Moreover, Staff has the advantage of being able to ascertain the Commissioners' concerns and are in the best position to try and address those concerns with the parties. The Commission would also have more control over the arbitration process, during the arbitration period, with staff involvement.²⁴ Finally, this is consistent with the method employed by the Commission in the joint arbitration of Cox Communications, WorldCom and AT&T against Verizon.

V. Conclusion

For the foregoing reasons, Global NAPs South, Inc. respectfully requests that the Commission grant the instant petition to preempt the Virginia Commission's jurisdiction and immediately institute an arbitration consistent with the method employed in the previous proceedings between Verizon and Cox, WorldCom and AT&T.

Respectfully submitted,

Global NAPs South, Inc.



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June 19, 2002

²⁴ The arbitration should be governed by the administrator's rules, incorporating the Commission's section 252(e)(5) procedural rules. *Local Competition Order*, 11 FCC Rcd at 16130-31, ¶¶ 1292-1295.

CERTIFICATE OF SERVICE

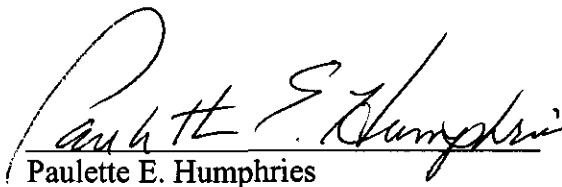
I, Paulette E. Humphries, do hereby certify a copy of the foregoing "Petition for Preemption" of Global NAPs South, Inc. was served on June 19, 2002 to each of the persons listed below:

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Paulette E. Humphries